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Supreme Court of the United States

OCTOBER TERM, 1991

EDWIN S. NUTBROWN, *et al.*,
Petitioners,

v.

RICHARD A. MUNN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. THE CONFLICT IS WIDENING

A. States

Avoiding the importance of the distinct federal questions presented, respondents urge a denial of the petition on the basis that there is no state conflict. However, a casual examination of the commentators establishes both the importance of the questions presented by this petition and the conflict among the states' highest courts. *See, e.g.*, Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Yuengert, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax*

Challenges Under Section 1983 of the Civil Rights Act of 1871?, 45 Washington and Lee L. Rev. 381 (1988); Taylor, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

The decisional law of Mississippi illustrates this conflict. In *State Tax Comm'n v. Fondren*, 387 So. 2d 712 (Miss. 1980), *cert. denied, sub nom., Redd v. Lambert*, 450 U.S. 1040 (1981), the Mississippi Supreme Court refused to entertain a challenge to a state tax brought under 42 U.S.C. § 1983, reasoning that because of the Tax Injunction Act's bar on federal court jurisdiction, taxpayers were required to exhaust state remedies. *Id.* at 723. The basis of the holding in *Fondren* is indistinguishable from the holding in *Nutbrown*. However, after this Court's decision in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Mississippi Supreme Court overruled *Fondren*, expressly holding that *Fondren* confused a federal court jurisdictional limitation "with the enforceability of a federally created right and remedy in state court." *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848, 864 (Miss. 1988).[1]

B. *Hafer v. Melo*

Respondents reassert the argument adopted by the court below that they are, in effect, immune from suit for "individual" liability for acts committed in the course of their "official" capacity because of the existence of a state remedy.[2] Respondents' argument is indistinguish-

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[1] *See also* the *Davis*-related case of *Barker v. State of Kansas*, No. 91-611, *cert. granted* (November 27, 1991), where the trial court rejected the assertion of an exhaustion requirement similar to that imposed by Oregon.

[2] Indeed, contrary to the assertion of the respondents, the state cases relied upon by the court below, rather than uphold the obligation of state courts to entertain actions brought pursuant to 42 U.S.C. § 1983, held that state remedies may displace the independent remedy created by Congress. *See, e.g., Zizka v. Water Pollution*

able from similar arguments rejected by this Court in *Hafer v. Melo*, —— U.S. ——, 112 S. Ct. 358 (1991). It held that the distinction urged "finds no support in the broad language of § 1983." *Id.* at 363. It also held that this "distinction cannot be reconciled with our decisions regarding immunity of government officers otherwise personally liable for acts done in the course of their official duties." *Id.* The Court also rejected arguments similar to the concerns of federalism advanced here by respondents, noting that " 'it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.' " *Id.* at 364. (citation omitted). Thus, under *Hafer*, the respondents may be held individually liable under section 1983 for acts performed in the course of their official duties. The decision of the Oregon Supreme Court in *Nutbrown*, which immunizes respondents from suit for personal liability under section 1983 because of the existence of a state remedy, cannot be reconciled with *Hafer*. Petitioners contend that this significant conflict, alone, warrants review and reversal of *Nutbrown* by this Court.

C. *Howlett v. Rose*

Respondents also contend that the petitioners are not entitled to declaratory and injunctive relief even though the respondents continue to enforce the discriminatory scheme for liabilities attributable to federal pensions paid after this Court's decision in *Davis v. Michigan Dep't of*

Control Authority, 195 Conn. 682, 490 A.2d 509 (1985); *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986). In sharp contrast, the holding of the Mississippi Supreme Court in *Burrell* is consistent with the settled principles recognized by the decisions of this Court. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961) (holding that a state remedy need not be first sought and refused before the section 1983 remedy is invoked); *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 869 (1991) (reaffirming that section 1983 provides a broadly construed remedy against *all* forms of official violation of federally protected rights).

Treasury, 489 U.S. 803 (1989). However, respondents do not explain the basis upon which such relief sought under § 1983 can be subjected to a condition of exhaustion when the identical form of relief for a purely state question is available in the Tax Court without resort to exhaustion. *See* Petition at 12 n.15, 17 n.25. Even if the respondents' arguments otherwise had merit, it is beyond dispute that Oregon may not discriminate against this federal cause of action. *See Howlett v. Rose*, —— U.S. ——, 110 S. Ct. 2430, 2440 (1990) (reaffirming that a state may not discriminate against federal causes of action).[3] Moreover, respondents ignore this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 870 (1991), which makes clear that petitioners "may sue and obtain injunctive and declaratory relief" under section 1983 with respect to tax matters.

II. THERE IS NO IMPLIED REPEAL OF § 1983

In the decision below, the Oregon Supreme Court legislated a result which is plainly at odds with the express will of Congress and the prior pronouncements of this Court. Ignoring the important federal questions presented and the significant role of *stare decisis* in our system of jurisprudence, the respondents assert that review should be denied on the basis of their policy views.[4]

The court below concluded that a taxpayer's right to the independent remedy of section 1983 had been *impliedly*

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[3] Petitioners respectfully note that the existence of the settled state right to declaratory relief for state questions undercuts the respondents' assertions that recognition of a section 1983 cause of action would be intrusive upon state concerns.

[4] The policy considerations of interference asserted here by the respondents and adopted by the court below are illusory. Respondents' real complaint is not about section 1983, but rather the breadth of the underlying constitutional rights sought to be vindicated in this case. *See* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 22 (1985).

repealed by the Tax Injunction Act, 28 U.S.C. § 1341. In so ruling, it ignored the holdings of this Court which disfavor implied repeals and which require clear evidence of congressional intent to do so. *See, e.g., Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Adickes v. S.H. Krees & Co.*, 398 U.S. 144 (1970). *Cf. Johnson v. Robison*, 415 U.S. 361, 373 (1974) (clear and convincing evidence of congressional intent is required before a statute will be construed to restrict access to judicial review). *See also* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L. Rev. 1, 27 (1985).

In carving out an exception to section 1983, premised on the Tax Injunction Act, the court below also ignored that "the purpose of a statute includes not only what it sets out to change, *but also what it resolves to leave alone.*" *West Virginia University Hosp., Inc. v. Casey*, —— U.S. ——, 111 S. Ct. 1138, 1147 (1991) (emphasis added). The Tax Injunction Act is a neutral limitation upon the jurisdiction of federal courts. It does not limit in any way the federally created right and remedy of section 1983 in state court.

Contrary to the conclusion of the Oregon Supreme Court, the Tax Injunction Act was specifically intended to cure the abuse of out-of-state corporations invoking the equity powers of the federal courts to interfere in state tax disputes "[a]nd all the time in this dispute there is no Federal question involved." 81 Cong. Rec. 1417 (1937).[5] *See also* S. Rep. 1035, 75th Cong., 1st

[5] Respondents' contentions regarding the Tax Injunction Act are also premised upon an underlying assumption which is contrary to historical fact. At the time the Tax Injunction Act was passed, section 1983 claims such as those at issue in this case had to be brought in state court. At that time, federal courts only had jurisdiction over taxpayer section 1983 claims which satisfied, *inter alia*, the amount-in-controversy requirement. *See* H.R. Rep. No. 1503,

Sess. 2 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937). Senator Bone, the legislation's sponsor, "emphasized . . . that the bill does not take away any equitable right of a taxpayer, or deprive him of a day in court." 81 Cong. Rec. 1416.

The Act's legislative history explicitly recognized that one of the existing rights of taxpayers was the exception permitting the enjoining of state and county taxes where the "tax law is invalid." H.R. Rep. No. 1503 at 2. Given the unequivocal intent of Congress "*not to take away any equitable right*," it is simply inconceivable that Congress intended to extinguish the obligations of state courts to enforce the rights expressly conferred by section 1983 and established by this Court's decisions. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Atchison & C. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912). *Cf. Mitchum v. Foster*, 407 U.S. 225 (1972) (section 1983 is an Act of Congress that falls within the expressly authorized exception to the federal anti-injunction statute of 28 U.S.C. § 2283).[6] Indeed, if Congress intended to permit the

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75th Cong., 1st Sess. 4 (1937). Accordingly, in enacting the Tax Injunction Act, Congress did nothing to alter or change the obligation of state courts to entertain taxpayer section 1983 claims similar to those in issue here since such claims were not cognizable in the federal courts in the first instance.

[6] There is nothing inconsistent with the enforcement of constitutional rights under the independent remedy of section 1983 and a state's own remedial scheme. *Cf. Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other without a more definite expression in the legislation Congress has enacted. . . ."). This is particularly so when preferring the state scheme over section 1983 is likely to result in the subsequent assertion that the section 1983 remedy is time barred. *Id.* at 466. *See also Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865, 869 (1991) ("[I]f Congress had intended to limit the 'broad and unqualified' language of § 1983, 'it is not unreasonable to assume that it would have made this explicit.'") (citation omitted).

states to impose exhaustion requirements upon section 1983, its subsequent conclusion that it was carving out a narrow exception to the non-exhaustion rule when it enacted 42 U.S.C. § 1997e was superfluous. Moreover, it was not the province of Oregon to "alter the balance struck by Congress in establishing the procedural framework for bringing actions under § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 512 (1982).[7]

In *Felder v. Casey*, 487 U.S. 131 (1988), this Court resolved that Congress has preempted state law exhaustion requirements for actions brought under section 1983. As noted by Justice Blackmun, "[o]ne of the sounder canons of judicial restraint is that once a court has spoken conclusively on a question of statutory interpretation, it should reconsider the question only when faced with compelling evidence that its initial answer was incorrect." *Individual Rights*, 60 NYU L. Rev. at 27.[8]

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[7] Respondents' reliance on their inverted analysis of the Tax Injunction Act is also misplaced. It assumes that the requisites of the Act are satisfied. The respondents have made clear that they will provide no relief unless ordered by a court to do so. TR. 222. A process, which requires that 40,000 elderly citizens separately establish that which the decision of this Court in *Davis* already established, is suspect at best. *See Garrett v. Bamford*, 528 F.2d 63, 71 (3d Cir.), *cert. denied*, 429 U.S. 977 (1976) ("Where legal remedies require multiple suits involving identical issues against the same defendant, federal equity practice has recognized the inadequacy of the legal remedy and has provided a forum."). In addition, the court below found that the agency had no subject matter jurisdiction over petitioners' claims. *See* Pet. App. A at 20a-21a. Forcing these elderly citizens to exhaust an administrative process before an agency which lacks subject matter jurisdiction to provide the relief sought under section 1983 is equally inadequate. *Direct Marketing Ass'n, Inc. v. Bennett*, 916 F.2d 1451, 1457 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991) ("Certainty that a remedy exists is an important factor in establishing that a state court remedy is 'plain.'") (citations omitted). *See also* Hull, *Uncertainty of State Remedy May Provide Access to Federal Courts*, 1 Journal of Multistate Taxation 135 (1991).

[8] The pre-*Felder*, state court decision of *Linderkamp v. Bismarck Sch. Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986), relied on by the Court

It was error for the court below to presume to overrule *Felder* in substantial part.

III. FUTILITY

The respondents' motion in the trial court was brought pursuant to local rule. Rule 21A is set forth in App. A at 1a. In accordance with that rule, petitioners submitted competent evidence that the respondents would provide no relief unless ordered to do so by a court. *See* Petition at 17-19. The respondents did not refute this evidence.

The decisions of this Court establish that exhaustion is excused where resort to the agency would have been futile. *See City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24 (1934); *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499 (1928). This settled principle applies with particular force where the delay attendant to exhausting the remedy will likely result in the subsequent assertion that a substantial part, if not all, of the federal claim is time barred. *See* note 6, *supra*.

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below, certainly is not compelling evidence that this Court's initial answer in *Felder* was incorrect. Moreover, the result reached by the court in *Linderkamp* cannot be reconciled with this Court's decision in *Dennis v. Higgins*, —— U.S. ——, 111 S. Ct. 865 (1991).

CONCLUSION

For the reasons set forth in the Petition, Supplemental Brief, and this Reply, petitioners respectfully request that their petition be granted and that the decision below be reversed.

Respectfully submitted,

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APPENDIX A

RULE 21. DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

A. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest (7) failure to join a party under Rule 29., (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until fur-

ther discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.